

**PENDAFTAR HAKMILIK, PEJABAT PENDAFTARAN WILAYAH
PERSEKUTUAN KUALA LUMPUR & ANOR v. POH YANG HONG**

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
LINTON ALBERT JCA
VERNON ONG LAM KIAT JCA
[CIVIL APPEAL NO: W-01-62-02-2013]
10 JUNE 2015

LAND LAW: *Sale of land – Search – Private and public searches on land – Inaccuracy of land registry – Private search revealed one registered owner – Public search revealed two different titles on one land – Claim for damages against Land Registrar – Tort of negligence – Statutory duties of Land Registrar to keep and maintain land registry – Whether breached – National Land Code, ss. 22, 384 & 385*

TORT: *Negligence – Statutory duty – Statutory duty of Land Registrar – Sale of land – Private and public searches on land – Inaccuracy of land registry – Private searches revealed one registered owner – Public search revealed two different titles on one land – Claim for damages against Land Registrar – Statutory duties of Land Registrar to keep and maintain land registry – Whether breached – National Land Code, ss. 22, 384 & 385*

The respondent ('the plaintiff') entered into a sale and purchase agreement with one Ng Lai Yin ('the first defendant') to purchase a piece of land ('the land'). The plaintiff carried out a private search on the land. Satisfied that the first defendant was the registered owner, the plaintiff proceeded to finalise the payments for purchase of the land at the price of RM4,451,160.20. However, when the plaintiff visited the land, he was asked to leave by one Mohamad who was allegedly the owner of the land. After conducting two official land searches, the plaintiff discovered that the land was in fact held under two different titles, namely (i) GRN 232 under which the first defendant was the registered owner of the land; and (ii) PN20992 under which Mohamad was the registered owner of the land. In the High Court, the plaintiff claimed for damages against the first and second appellants ('the second and third defendants') premised on the tort of negligence and submitted, *inter alia*, that there was failure to ensure the particulars of the land as per the registered records of the second defendant's land registry were at all times accurate. In opposing the plaintiff's claim, the defendants argued that they were not liable as the search conducted by the plaintiff was a private search under s. 384 of the National Land Code ('NLC') and not an official search under s. 385 of the same. The High Court held in favour of the plaintiff on the grounds, *inter alia*, that (i) there was breach of statutory duty by the second defendant to maintain an accurate register of all lands; and (ii) the second defendant was not excluded from liability in his official capacity in cases where the person who had

A requisitioned a private search had acted to his detriment in relying on the result of the search carried out by the officer or staff of the second defendant. The High Court further allowed the plaintiff's claim for RM356,092.80. Hence, the present appeal.

Held (dismissing appeal with costs)

B **Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:**

- C (1) The two sets of titles for the same land in the land registry led to no other conclusion that there was something amiss with the records in respect of that piece of land. It should not have happened. The High Court did not err in finding that the second and third defendants failed to ensure the records for the land were accurate. The second and third defendants were required by the NLC to keep and maintain a register of title of lands. Effectively, the plaintiff was not shown by the Land Office the correct register when he did the private search. (paras 13, 14 & 16)
- D (2) The apparent difference between ss. 384 and 385 of the NLC are of little relevance particularly since the cause of action was not the accuracy of what was printed on the 'carian persendirian' and the 'carian rasmi' but the failure to ensure that the particulars in the register of title were accurate and that it could not possibly be held to be even arguably correct when, for the same piece of the title, there were two sets of record, each with a different person registered as the registered proprietor. (para 17)
- E (3) The loss must be proved. If there was no evidence of loss, no damages for loss could be recovered. The plaintiff had produced, *inter alia*, evidence of a sale and purchase agreement, cheques, application for loan facility, proposal of purchase price, offer of immediate payment of earnest deposit and payments of purchase price. The second and third defendants failed to demonstrate that the High Court had erred and that the error so affected the merits that appellate intervention was required to correct the injustice occasioned by the error. (paras 23, 24 & 26)
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- G

Bahasa Malaysia Translation Of Headnotes

- H Responden ('plaintiff') telah memasuki satu perjanjian jual beli dengan satu Ng Lai Yin ('defendan pertama') untuk membeli sebidang tanah ('tanah tersebut'). Plaintiff telah menjalankan carian persendirian ke atas tanah tersebut dan setelah berpuas hati bahawa defendan pertama merupakan pemilik berdaftar, plaintiff meneruskan dengan melunaskan bayaran bagi pembelian tanah tersebut pada harga RM4,451,160.20. Walau bagaimanapun, apabila plaintiff melawat tanah tersebut, dia diminta agar beredar oleh satu Mohamad, yang dikatakan adalah pemilik tanah tersebut.
- I Selepas menjalankan dua carian rasmi ke atas tanah tersebut, plaintiff mendapati bahawa ia sememangnya dipegang di bawah dua hak milik, iaitu (i) GRN 232 di bawah mana defendan pertama adalah pemilik berdaftar tanah tersebut; dan (ii) PN20992 di bawah mana Mohamad adalah pemilik

berdaftar tanah tersebut. Di Mahkamah Tinggi, telah plaintif menuntut ganti rugi terhadap perayu pertama dan kedua ('defendan kedua dan ketiga') berdasarkan tort kecuai dan menghujahkan, antara lain, bahawa terdapat kegagalan untuk memastikan butir-butir tanah dalam rekod pendaftaran tanah adalah, pada setiap masa, tepat. Dalam membantah tuntutan plaintif, defendan-defendan menghujahkan bahawa mereka tidak bertanggung kerana carian yang dijalankan oleh plaintif adalah carian persendirian di bawah s. 384 Kanun Tanah Negara ('KTN') dan bukan satu carian rasmi di bawah s. 385 Akta yang sama. Mahkamah Tinggi memutuskan berpihak kepada plaintif atas alasan bahawa, antara lain, (i) berlaku pelanggaran tugas statutori oleh defendan kedua untuk memastikan pendaftaran kesemua tanah adalah tepat; dan (ii) defendan kedua tidak terkecuali daripada tanggungan dalam kapasiti rasminya dalam kes-kes di mana pihak yang memohon satu carian persendirian telah rugi akibat bergantung kepada hasil carian yang dijalankan oleh pegawai atau kakitangan defendan kedua. Mahkamah Tinggi selanjutnya membenarkan tuntutan plaintif sebanyak RM356,092.80. Oleh itu, rayuan ini.

Diputuskan (menolak rayuan dengan kos)

Oleh Vernon Ong Lam Kiat HMR menyampaikan penghakiman mahkamah:

- (1) Kedua-dua set hak milik ke atas tanah yang sama dalam pendaftaran tanah membawa kepada satu kesimpulan iaitu bahawa terdapat sesuatu yang tidak kena pada rekod tanah tersebut. Ia tidak sepatutnya berlaku. Mahkamah Tinggi tidak terkhilaf dalam memutuskan bahawa defendan kedua dan ketiga gagal untuk memastikan bahawa rekod tanah tersebut adalah tepat. Defendan kedua dan ketiga dikehendaki oleh KTN untuk menyimpan dan menyenggara pendaftaran hak milik tanah-tanah. Secara efektifnyanya, plaintif tidak dikemukakan dengan pendaftaran yang betul oleh Pejabat Tanah semasa dia melakukan carian persendirian.
- (2) Perbezaan jelas antara ss. 384 dan 385 KTN kurang relevan khasnya kerana kausa tindakan bukanlah berkenaan ketepatan apa yang tercetak pada carian persendirian dan carian rasmi tetapi kegagalan untuk memastikan butir-butir dalam pendaftaran hak milik adalah tepat dan ia tidak boleh diputuskan sebagai betul apabila, untuk hak milik sebidang tanah yang sama, terdapat dua set rekod, di mana setiap satu dengan orang yang berlainan didaftarkan sebagai pemilik berdaftar.
- (3) Kerugian mestilah dibuktikan. Jika tiada keterangan kerugian, tiada ganti rugi bagi kerugian boleh diperolehi. Plaintif telah mengemukakan, antara lain, keterangan perjanjian jual beli, cek-cek, permohonan bagi kemudahan pinjaman, harga belian yang dicadangkan, tawaran bayaran serta merta deposit wang cengkeram dan bayaran-bayaran harga belian. Defendan kedua dan ketiga gagal membuktikan bahawa Mahkamah Tinggi terkhilaf dan bahawa kekhilafan tersebut mewajarkan campur tangan rayuan untuk memperbetulkan ketidakadilan yang disebabkan oleh kekhilafan tersebut.

A Legislation referred to:

National Land Code, ss. 22, 384, 385, 386

For the appellants - N Sundareson (Kong Siew Chuo with her); SFCs

*For the respondent - N Chandran (V Vijakumar & Sasha Lian Shar Hoong with him);
M/s Albar & Partners*

B *[Editor's note: For the High Court judgment, please see Poh Yang Hong v. Ng Lai Yin
& Ors [2013] 8 CLJ 964 (affirmed).]*

Reported by Najib Tamby

JUDGMENT

C Vernon Ong Lam Kiat JCA:

Introduction

D [1] This appeal relates to a decision of the High Court giving judgment for the plaintiff's claim against Pendaftar Hakmilik, Wilayah Persekutuan Kuala Lumpur and Kerajaan Malaysia (the second and third defendants respectively) for damages for negligence for failing to ensure that the particulars of records of the land registry is accurate.

[2] Judgment in default has been taken against the first defendant.

E [3] The second and third defendants are appealing against the whole of the High Court decision whilst the plaintiff is cross-appealing against a part of the decision of the High Court. In this grounds of judgment, the parties shall be referred to as they were in the High Court.

Brief Account Of The Salient Facts

F [4] The plaintiff entered into negotiations with the first defendant to purchase a piece of vacant land held under GRN 232, Lot 349 Seksyen 71, Bandar Kuala Lumpur Daerah Kuala Lumpur Negeri Wilayah Persekutuan Kuala Lumpur ("the land") measuring 1688 square meters. According to the document of title to the land, the first defendant is the registered owner of the land. The following chronology is a summary of the key events.

G 28.8.2007 In furtherance to the agreement between the plaintiff and the first defendant to enter into a sale and purchase agreement, the plaintiff paid to the first defendant's solicitors RM89,023 as earnest deposit.

H 18.9.2007 The plaintiff's solicitors conducted a private search ("the private search") at the land registry of the Wilayah Persekutuan Kuala Lumpur. According to the private search the first defendant is the registered owner of the land.

I 8.10.2007 The plaintiff and the first defendant entered into a sale and purchase agreement dated 8 October 2007 ("the SPA") under which the plaintiff agreed to purchase and the first defendant agreed to sell the land for a total consideration of RM4,451,160.

6.11.2007	The plaintiff obtained a loan of RM2.5 million from HSBC Bank Malaysia Bhd to part finance the purchase of the land.	A
5.12.2007	The plaintiff made two payments of RM1 million and RM506,044 to the first defendant's solicitors.	
11.2.2008	The transfer and the charge documents were presented to the second defendant's office for registration.	B
19.2.2008	The loan sum of RM2.5 million is disbursed to the first defendant's solicitors.	
10.3.2008	Messrs Rajendran & Deen, solicitors for one Loh Kok Choy ("Loh") wrote to the land registry of Wilayah Persekutuan Kuala Lumpur informing that the original document of title is in their possession. They also asked the latter not to proceed with the registration of the transfer of the land in favour of the plaintiff.	C
3.6.2008	The plaintiff and his architect visited the land. They are asked to leave by one Mohamad Nor bin Mohamad ("Mohamad") who claimed to be the owner of the land.	D
4.6.2008	The plaintiff's solicitors conducted two official land searches ("the official searches"). They discovered that the land was in fact held under two different sets of titles:	E
	(a) GRN 232 Lot 349 Seksyen 71, Bandar Kuala Lumpur Daerah Kuala Lumpur Negeri Wilayah Persekutuan Kuala Lumpur under which the first defendant was the registered owner; and	F
	(b) PN 20992 Lot 349 Seksyen 71 Bandar Kuala Lumpur Daerah Kuala Lumpur Negeri Wilayah Persekutuan Kuala Lumpur under which Mohamad was the registered owner.	
5.6.2008	The plaintiff lodged a police report at the Jalan Bandar Police Station.	G
9.6.2008	First defendant's solicitors forwarded to plaintiff's solicitors a statutory declaration of first defendant. According to the statutory declaration the land had been alienated to him by the Kuala Lumpur Land Office through the services of one How Yee Yah ("How"), a so-called land alienation consultant. The first defendant also declared that he had been paid RM500,000 for his services and that he had collected the balance purchase price for the land and paid it in cash to How.	H
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A Plaintiff's Claim Against The Second And Third Defendants

[5] In essence, the plaintiff's claim for damages is premised on the tort of negligence. The particulars of negligence as pleaded are as follows:

- B (i) Failure to ensure that the particulars of the land as per the registered records of the second defendant's land registry are at all times accurate;
- (ii) Failing to ensure that the particulars of the land as per the registered records of the second defendant's land registry and as furnished by the second defendant to the plaintiff on payment of a fee, contain accurate details of the land which can be relied on by the plaintiff; and
- C (iii) Maintaining inconsistent and/or contradictory entries in respect of particulars of land registered with the registry and in consequence, providing members of the public, like the plaintiff, information relating to the land on which a search is conducted on payment of the requisite fee, and which information is not true or incorrect to the detriment of
- D the member of the public making the search and relying thereon, like the plaintiff.

Second And Third Defendants' Defence

[6] Briefly, the pleaded defence is mounted on the following main planks:

- E (a) the second and third defendants do not owe any duty of care to the plaintiff;
- (b) the information supplied to the plaintiff under the first search was accurate according to the second defendant's records at the time it was
- F provided;
- (c) the second and third defendants are not liable by virtue of the protection accorded under s. 22 of the NLC;
- (d) the existence of the forged title bearing the description GN 232 was
- G caused by the conduct of a third party; and
- (e) that they are not liable as the search conducted by the plaintiff on 18 September 2007 at the second defendant's land registry was a private search under s. 384 of the National Land Code (NLC) and not an official search under s. 385 of the NLC.

H Findings Of The High Court

[7] The findings of the learned trial judge after full trial may be summarised as follows:

- I (i) The second defendant is charged with the statutory duty to maintain a register of all lands caused to be registered at the registry, Wilayah Persekutuan, Kuala Lumpur;

- (ii) The second defendant must take all reasonable steps to ensure that the register contains only correct, true and accurate information; **A**
- (iii) The second defendant owes a duty of care to the plaintiff to ensure that the register reflects the true and actual description of the title to the land and the true identity of the registered proprietor of the land; **B**
- (iv) There was a clear breach by the second defendant of the statutory duty imposed under the NLC and the second defendant was clearly negligent because the search, *albeit* a private search pursuant to s. 384 of the NLC, disclosed that the first defendant was the registered proprietor of the land at the material time; **C**
- (v) The fact that the forged title bearing the description GN 232 was caused by an unidentified third party did not absolve the second defendant's liability arising from its breach of duty of care. **D**
- (vi) Section 22 of the NLC is inapplicable to the facts of the case and cannot avail the second and third defendants to absolve themselves from liability to the plaintiff. **E**
- [8]** At the close of the trial, learned counsel for the second and third defendants also took the additional point that they are not liable as the search conducted by the plaintiff on 18 September 2007 at the second defendant's land registry was a private search under s. 384 of the National Land Code (NLC) and not an official search under s. 385 of the NLC. On this issue, the learned trial judge held as follows:
- (i) The failure or omission on the part of the second and third defendants to plead this point in their amended defence is fatal to them; and **F**
- (ii) There is nothing in s. 386 of the NLC which expressly excludes the liability of the second defendant in his official capacity in cases where the person who has requisitioned a private search has acted to his detriment in relying on the result of the search carried out by the officer or staff of the second defendant. **G**
- [9]** In consequence of the aforesaid findings, the learned trial judge made the following orders:
- (a) Plaintiff's claim for RM89,023.23 which was paid by the plaintiff before the first search was conducted was dismissed; and **H**
- (b) Plaintiff's claim for RM356,092.80 which was paid upon the execution of the SPA and after the first search was allowed.

Decision

- [10]** The nucleus of the three pleaded causes of action is the accuracy of the registered records in the second defendant's land registry. The evidence showed that the private search on 18 September 2007 found that the registered owner of the land held under GRN 232, Lot 349 Seksyen 71, **I**

- A Bandar Kuala Lumpur Daerah Kuala Lumpur Negeri Wilayah Persekutuan Kuala Lumpur was the first defendant. On that basis, the plaintiff proceeded to finalise a sale and purchase agreement to purchase the land for RM4,451,160.20. Having paid before the private search RM89,023 as earnest deposit, he paid the balance of deposit of RM356,092.80 at the time of signing. To complete the purchase, he paid the balance RM4,006,044 by 19 February 2008.

[11] On 3 June 2008, on visiting the land, the plaintiff and his architect was asked by Mohamad who claimed to be the owner of the land, to leave.

- C [12] The subsequent official searches on the next day by the plaintiff's solicitors led to the discovery that these was in fact two different sets of titles issued for the land:

- D (a) The first defendant was registered as the owner of GRN 232 Lot 349 Seksyen 71, Bandar Kuala Lumpur Daerah Kuala Lumpur Negeri Wilayah Persekutuan Kuala Lumpur; and
(b) Mohamad was registered as the owner of FN 20992 Lot 349 Seksyen 71 Bandar Kuala Lumpur Daerah Kuala Lumpur Negeri Wilayah Persekutuan Kuala Lumpur.

- E [13] The two sets of titles for the same land in the land registry leads to no other conclusion that there is something amiss with the records in respect of that piece of land. It should not have happened. It could only happen by another person in the land registry having access by way of password to access the database of the land registry to create the set of title record. Clearly, it could only happen with the participation of someone in the land registry and not some third party outside alone. Certainly, there is no evidence it could be accomplished by a third party alone. The submission it was the act of a third party holds no merit. The High Court did not err in finding the second and third defendants had failed to ensure the records for the land are accurate.

- G [14] No doubt the realisation that the second and third defendants are responsible for the act of an employee in the land registry prompted the submission that the second and third defendants owe no duty of care to the plaintiff. The submission fails to take into consideration that the second and third defendants are required by the National Land Code 1965 to keep and maintain a register of title of lands. The register does not only serve the administrative function of recording who owns what to protect landowners, but also a more important economic objective of providing assurance to intending purchasers of land that it is safe to purchase land from the person whose name is on the register. Once he gets his name registered as the proprietor in the register of title, his title is indefeasible. Without such assurance, it would be a risky act to buy property, or accept property as security, with the result demand and therefore prices would fall. History has

shown that the introduction of the land registration system had a direct correlation with economic development. The submission that the second and third defendants owed no duty to the plaintiff is therefore without merit. Authority carries with it responsibility, and authority over every citizen carries with it responsibility to every citizen affected by the actions or inactions in carrying out that responsibility. It is the basis upon which the relationship of proximity and duty of care is founded, and liability, where the damage suffered is, as in this case, clearly foreseeable.

[15] That the particulars supplied at the time of the first search was accurate at that time is equally without merit. It does not explain why particulars obtained upon a search in the registry can be accurate at one point of time and cease to be accurate at another. Certainly that militates against the *raison d'être*, the very reason for the existence, of the National Land Code. The submission suggests the private search particulars were accurate until Mohamad emerged as a registered owner of the same land. Even if that were so, it supports the claim that the plaintiff's loss was the result of the particulars supplied at the private search.

[16] There can be no double standard that the record made available upon a private search is, as in this case, wholly erroneous as to who is the owner as opposed to what is expected that it may be less up to date in respect of the dealings recorded. Effectively, the plaintiff was not shown by the land office the correct register when he did the private search.

[17] In perspective, the submission that the second and third defendants are not liable because the private search was a private search and not an official search, is an afterthought recognising that the submission that the particulars obtained under the private search was correct at the time carries no merit. There is no statement in the form for "Catatan Carian Persendirian" that the particulars found are not binding. To infer that there is such a reservation defeats the purpose and value of the "Catatan Carian Persendirian". Brought into the context of the facts of this case, there is no evidence whatsoever when the accuracy of the particulars changed to being inaccurate, except that, at the official searches there emerged record of title with Mohamad as the registered proprietor. The fact is there emerged a second set of title documents, when the appreciable difference between a "Carian Persendirian" and a "Carian Rasmi" is that the "Carian Persendirian" may not show dealings that are in the process of registration. The apparent difference between ss. 384 and 385 of the National Land Code are of little relevance particularly since the cause of action is not the accuracy of what is printed on the "Carian Persendirian" and the "Carian Rasmi" but the failure to ensure that the particulars in the register of title are accurate and that it could not possibly be held to be even arguably correct when for the same piece of title there are two sets of record, each with a different person registered as the registered proprietor.

- A [18] What about the protection accorded under s. 22 of the National Land Code? It provides for protection of officers and reads as follow:

No officer appointed under this Part shall be liable to be sued in any civil court for any act or matter done, or ordered to be done or omitted to be done, by him in good faith and in the intended exercise of any power, or performance of any duty, conferred or imposed on him by or under this Act.

- C [19] The intended protection is for wholly different set of circumstances. This is obvious from the words "... in good faith and in the intended exercise of any power, or performance of any duty, conferred or imposed on him by or under this Act". The existence of two sets of record of title under two different persons as registered owner militates against the conclusion that their action, without explanation, is in good faith and in the intended exercise of any power, or performance of any duty, conferred or imposed on him by or under this Act. The section would apply, in this case, to protect officers for every action they take to find out how it happened and to make sure it never happens again. But not in the circumstances canvassed in the submissions.

- E [20] Finally the damages. The sale and purchase price was RM4,451,160. Earnest deposit of RM89,023.20 had been paid earlier. The balance payable under the sale and purchase agreement was RM4,451,160 - RM89,023.20 = RM4,362,136. Since RM356,092.80 was paid at time of signing of the agreement, a balance of RM4,006,044 remained to be paid at final settlement. This tallies with the RM2,500,000 + RM1,000,000 + RM506,044 = RM4,006,044. But since only the first deposit of RM89,023.20 is disallowed, the plaintiff is entitled to RM4,362,136 together with interest and costs.

- G [21] It was submitted for the second and third defendants that the plaintiff had failed to prove his loss. The summary of the defence of the second and third defendants were in respect of liability and not quantum. The issues to be tried include the issue that if the second and third defendants were held liable, the "quantum of the damages as payable by them to the plaintiff in the circumstances and on the facts of the matter herein".

- H [22] The plaintiff, in this case, had produced the sale and purchase agreement and cheques issued.

- I [23] It is of course established law the loss must be proved. If there is no evidence of loss, no damages for loss can be recovered. But there are two broad categories of losses: special damages and general damages. The definitions vary according to context and jurisdiction, in contract and in tort. But suffice to say that proof is upon a balance of probabilities and not on the standard of beyond reasonable doubt.

[24] Proof on a balance of probabilities simply means that the party upon whom the burden lies, in this case the plaintiff, must put before the court some evidence that tends to prove the loss. Even if the evidence is merely demand made against the plaintiff for payment, it is nevertheless evidence of a loss. It is not the law that he must prove he had paid first before he can recover. In this case, the plaintiff had produced evidence of a sale and purchase agreement, his solicitor's letter forwarding cheques for RM1,000,000 and RM506,044, application for loan facility of RM2,500,000, the letter of Nik Hussain & Partners forwarding a cheque for the loan of RM2,500,000, a statutory declaration of Ng Lai Yin, the proposal to purchase at RM4,451,160, offering immediate payment of earnest deposit of RM89,023.20, further payment of RM356,092.80 as balance of 10% of purchase price, Hong Leong Bank Bhd cheques for RM89,023.20 and RM356,092.80.

[25] It is a common temptation for a party against whom proof is produced to profess that the evidence produced is not satisfactory. The law, however, is not proof and evidence to the satisfaction of a defendant, but whether the court appreciates that it has been proved upon a balance of probabilities. In this case, apart from the second and third defendants' profession of being unsatisfied by the evidence produced by the plaintiff, there is nothing placed on the scales of justice to tilt the balance against the plaintiff.

[26] In the circumstances, we concluded that the second and the third defendants had failed to demonstrate that the High Court had erred, and that the error so affected the merits that appellate intervention is required to correct the injustice occasioned by the error.

Conclusion

[27] Accordingly, we dismiss the appeal with costs. The plaintiff's cross-appeal is also dismissed with no order as to costs.

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